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No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, *ET AL.*,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, AS UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* CITIZENS' COUNCIL FOR HEALTH FREEDOM, ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND INDIVIDUAL PHYSICIANS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The following questions are presented:

1. Whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA?

2. Considering *Chevron* Step Zero, whether Section 36B the statute granting certain regulatory authority to the IRS – is itself unconstitutional?

3. Considering *INS v. Chadha* and *Clinton v. City of New York*, could the IRS have promulgated such regulations, which are legislative in nature, scope and effect, without offending the Bicameral and Presentment Clauses?

4. Does the IRS's extension of the regulations to the federal exchanges break down the lines which separate the States in contravention of *McCulloch v. Maryland*?

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents ii
Table of Authorities v
Interests of *Amici Curiae* 1
Preliminary Statement 3
Statement of the Case 6
Summary of Argument 7
Argument 10
I. *Chevron* Does Not Apply To Invalid Grants Of Regulatory Authority 10
A. Considering *Whitman*, Congress Should Determine The Scope Of IRS Authority 11
B. The Court Would Become Embroiled In The Legislative Process If It Accepts An IRS Construction Of A Statute Which Contradicts The Plain Words Of That Statute. 11
C. Implied Ratification Of The Regulations Would Create A Dispensing Power In The IRS And Would Allow The IRS To Pick And Choose Which Statutes To Faithfully Execute. 13
D. Regulatory Authority Is Void If The Underlying Statutory Grant To The IRS Is Unconstitutional. 14

II. Congressionally Defined Words, Such As "Exchange", May Not Be Altered By The IRS. 16

III. The IRS May Not Ignore The Constitution's Text, Structure And History To Redefine An "Exchange" To Encompass A Federally-Created Exchange 19

IV. Section 36B Violates Multiple Provisions In The Constitution 22

A. Permanent Appropriations, Like The §36B Subsidy, (1) Violate The Presentment, Bicameral And Appropriations Clauses; And (2) Defy The Temporal Limits On Each Term Of The President, Each Senator, And Each Member Of The House Because No Congress May Withhold Legislative Power From Future Congresses And Veto Power From Future Presidents. 22

B. As A Senate-Originated Bill, ACA Cannot Contain Any Tax. 27

1. Because The Origination Clause And Power To Lay And Collect Sit In *Pari Materia*, All Taxes *Per Se* Are Bills For Raising Revenue 29

2. To Avoid "Junk Economics" In The Courtroom, All Tax Bills Must Originate In The House Because Any Tax Potentially Could Increase Or Decrease Total Federal Revenue 30

3. The Senate Impermissibly Originated ACA Because It Gutted The House-Passed HR 3590. 31

4. Until An Article V Amendment Is Ratified, The Senate May Not Originate Section 36B 33

V. The Court Cannot Salvage ACA And The Individual And Employer Mandates By Severing Section 36B From Them 34

Conclusion 37

TABLE OF AUTHORITIES

Pages

Cases

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 36, 37

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 9

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Clinton v. City of New York, 524 U.S. 417 (1998) ..... *passim*

District of Columbia v. Heller, 554 U.S. 570 (2008) 2

Forshey v. Principi, 284 F.3d 1335 (Fed. Cir.) (en banc), *cert. denied*, 537 U.S. 823 (2002) ... 15

Freytag v. Commissioner, 501 U.S. 868 (1991) .. 24

INS v. Chadha, 462 U.S. 919 (1983) ..... *passim*

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 18

Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991) 15

Kendall v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524 (1838) 13, 14

Loving v. United States, 517 U.S. 748 (1996) 18

Marbury v. Madison, 5 U.S. 137 (1803) 9

McCulloch v. Maryland,
17 U.S. 316 (1819) ..... i, 6, 22

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 17, 18

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012) 4, 12, 27

New York v. United States,
505 U.S. 144 (1992) 20-21, 25, 36

Oklahoma ex rel. Pruitt v. Burwell, 2014 U.S. Dist. LEXIS 139501 (E.D. Okla. Sept. 30, 2014) 6

OPM v. Richmond, 496 U.S. 414 (1990) 23

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 18

Roe v. Wade, 410 U.S. 113 (1973) 9

South Ottawa v. Perkins, 94 U.S. 260 (1877) 15

Springer v. Henry, 435 F.3d 268 (3d Cir. 2006) 2

Stenberg v. Carhart, 530 U.S. 914 (2000) 2

Texas v. White, 74 U.S. 700 (1869) 21

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 19, 20, 27, 33

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 14, 15

United States v. Lopez 514 U.S. 549 (1995) 19

United States v. Symonds, 120 U.S. 46 (1887) .. 14

Wayman v. Southard,
10 Wheat. (23 U.S.) 1 (1825) 14

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001) 11

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 12

Constitution, Statutes, and Regulations

U.S. CONST. art. I 4. 20, 27. 29
U.S. CONST. art. I, §1 ..... *passim*
U.S. CONST. art. I, § 2, cl. 1 ..... 25, 26
U.S. CONST. art. I, § 3, cls. 1&2 26
U.S. CONST. art. I, § 7 29
U.S. CONST. art. I, § 7, cl. 1 ..... *passim*
U.S. CONST. art. I, § 7, cl. 2 ..... i, 7, 16, 22
U.S. CONST. art. I, § 8 29
U.S. CONST. art. I, § 8, cl. 1 ..... 17, 27, 29
U.S. CONST. art. I, § 8, cl. 2 27
U.S. CONST. art. I, § 8, cls. 2-18 29
U.S. CONST. art. I, § 9, cl. 7 ..... 22, 23, 27
U.S. CONST. art. II 4, 20, 27
U.S. CONST. art. II, § 1, cl. 1 26
U.S. CONST. art. III 4, 20
U.S. CONST. art. IV 20
U.S. CONST. art. IV, § 4 19
U.S. CONST. art. V 19, 20, 23, 33
U.S. CONST. art. VI 20
U.S. CONST. art. VII 20
U.S. CONST. amend. XVII 26
Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) 3
Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) .... *passim*
Section 1311 ..... *passim*

Section 1311(b)(1) 6
Section 1321 ..... i, 3
Section 1401 ..... 3, 7, 18
Title I 6, 7, 16
26 U.S.C. § 36B ..... *passim*
26 U.S.C. § 36B(b)(2)(A) 7
31 U.S.C. § 1324 23
77 Fed. Reg. 30,377 *et seq.*
(May 23, 2012) ..... *passim*

Legislative Authorities

155 Cong. Rec. H10550 (Oct. 7, 2009) 31, 32

155 Cong. Rec. H11126 (Oct. 8, 2009) 31

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156 Cong. Rec. H2153 (Mar. 21, 2010) 33

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Jonathan Gruber, *Written Testimony before the Committee on Oversight and Government Reform*, U.S. House of Representatives, 113th Cong., 2d Sess. (Dec. 9, 2014) 6

Hearing on "The Original Meaning of the Origination Clause" before the U.S. House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice, 113th Cong., 2d Sess.

(April 29, 2014)(Testimony of Nicholas M. Schmitz) 28

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Briefs

Brief of *Amici Curiae* U.S. Representatives Trent Franks *et al.* in Support of Appellant Seeking Reversal in *Sissel v. U.S. Dep't of Health & Human Servs.* (D.C. Cir., Docket No. 13-5202) 29

Brief *Amici Curiae* for Economic Scholars in Support of Appellees in *King v. Sebelius* (4th Cir., Docket No. 14-1158)..... 34, 35

Articles and Other Authorities

Linda J. Blumberg, John Holahan, and Matthew Buettgens, *Halbig v Burwell: Potential Implications for ACA Coverage and Subsidies* (July 2014)(Robert Wood Johnson Foundation & Urban Institute)..... 35

Tom Campbell, *Severability of Statutes,* 62 Hastings L. J. 1495 (2011) 36-37

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Alen Dumonjic, *Highlighting Audible Usage by the NFL's Best QBs*, Bleacher Report (Aug. 5, 2012), available at http://bleacherreport.com/articles/1285529-highlighting-audible-usage-by-the-nfls-best-qbs 25

The Federalist No. 21.....30-31

The Federalist No. 51.....16, 20

Marci Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999).....4, 5, 9

Peter W. Huber, *Junk Science in the Courtroom*, 26 Val. U. L. Rev. 723 (1992).....30

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Paul A. Samuelson, *Economics* (10th ed. 1976) 30

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are individual physicians, a national association of physicians and surgeons, and a national association of patients and physicians. *Amici* file this brief in support of Petitioners.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the

[1] *Amici* file this brief with the blanket consents of the Petitioners and Respondents, which are on file with the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

patient-physician relationship. This Court has made use of *amicus* briefs submitted by AAPS in high profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). Because AAPS is a Plaintiff against some of the Respondents in an action which contains allegations of unconstitutionality, the disposition of this case may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Burwell*, Supreme Court Docket No. 14-350.

Amicus Citizens' Council for Health Freedom ("CCHF"), a national health policy organization, is organized as a Minnesota non-profit corporation. CCHF exists to protect health care choices and patient privacy. CCHF is supported by individuals, health care practitioners and employers, whose rights and freedoms will be impacted by the outcome of this case.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Robert L. Pyles, M.D., privately practices psychiatry and psychoanalysis in the Boston area. He has held a variety of leadership positions with organized medicine and psychiatry, locally, nationally and internationally.

Amicus Graham L. Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have studied the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010). *Amici* have also studied the regulations promulgated by the IRS regarding federal tax credit subsidies for both state-created (§1311) and federally-created (§1321) healthcare exchanges. 77 Fed. Reg. 30,377 *et seq.* (May 23, 2012)("Regulations"). Because the Regulations were promulgated under the alleged authority of Sections 1311, 1321, and 1401 of ACA ("Statutory Grants"), *Amici* believe the Regulations were promulgated *ultra vires* because the Statutory Grants are unconstitutional.

PRELIMINARY STATEMENT

In forging the Constitution in 1787, our Founders diffused power along multiple axes to better secure liberty. *Clinton v. City of New York*, 524 U.S. 417, 452 (1998)(Kennedy, J., concurring). Along one axis, power was split between Federal and State sovereigns. Along a second axis, federal power was further separated among three branches: the

Legislative, Executive and Judicial Branches. U.S. CONST. arts. I, II, and III, respectively.

Amici extend the geometric analogy by suggesting the Founders diffused power along a third axis, time, because the Constitution limits the duration of the terms of members of the House of Representatives, the Senate and the President. As explained below, the Premium Tax Credit subsidy is an admittedly permanent appropriation which compromises the independence of future Congresses and Presidents to Tax, Spend, Borrow and Appropriate.

"The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S.Ct. 2566, 2677 (2012)("*NFIB*)(Joint Opinion of Justices Scalia, Kennedy, Thomas, and Alito, dissenting). That fragmentation or diffusion of power may not be ignored by this Court. The concept of diffused or fragmented power is fortified by the "non-delegation doctrine." According to one commentator:

> The nondelegation doctrine is rooted in the structure of the Constitution, which distinguishes between legislative and executive power. Lawmaking power is given to Congress and enforcement power to the President. In its simplest terms, it is a rule that prohibits Congress from "forsaking its [lawmaking] duties" by handing them off to the executive branch. Rather, Congress must embrace its particular responsibilities, while the Executive does the same. In Justice Kennedy's memorable words, "[a]bdication of

> responsibility is not part of the constitutional design."

Marci Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 807 (1999) ("*Representation & Nondelegation*")(footnotes omitted). Legislative power is reposed in Congress, rather than a single agency or Executive Department, because it is better able to balance multiple viewpoints.

> The legislative branch serves the people by filtering the factions in the society and distilling those laws that will best serve the nation ... [P]ositions must be funneled through a large number of ports before becoming governing law ... As a result, it is capable of reaching more nuanced compromises on national issues.

Id. at 814 (footnote omitted). In addition, when lawmaking is delegated to the President there is but one port of entry, one viewpoint, albeit representing the entire nation. When lawmaking is delegated to an agency or an executive department, the viewpoint is even narrower and without electoral accountability. *Id.* at 819-821.

It is worth noting what this case is and is not about. "Our tale, though scripted and set in America's ongoing health care debate, is not actually about health care at all. It is about whether government officials are subject to democratic constraints." Michael F. Cannon, *ObamaCare: The Plot Thickens*, 14 Harvard Health Policy Review 36, 39 (2013)("*Cannon*"). It is about whether the Regulations deliver a body-blow to the Separation of Powers

Doctrine and break down the lines which differentiate the States from the national government. *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819).

STATEMENT OF THE CASE

Two years ago, Professor Jonathan Gruber made the statement that "***if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits.***" *Oklahoma ex rel. Pruitt v. Burwell*, 2014 U.S. Dist. LEXIS 139501 (E.D. Okla. Sept. 30, 2014)(emphasis added). Whether not his statement was "off the cuff" or has been disavowed, *id.*, or even taken out of context,[2] that quotation crystallizes the issue in this case.

As a major contributor to the drafting, passage and implementation of ACA and as a member of the M.I.T. Economics Department, Professor Gruber's admission carries great weight.

In Section 1311, Congress explicitly defined the word "Exchange" as a State-created entity. Subsection 1311(b)(1) provides: "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (***referred to in this title as an "Exchange"***) for the State ...." 124 Stat. at 173 (emphasis added). Because this definition applies (and the "E" is capitalized) throughout Title I of ACA, there are no exceptions.

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[2] Jonathan Gruber, *Written Testimony before the Committee on Oversight and Government Reform*, U.S. House of Representatives, 113th Cong., 2d Sess. (Dec. 9, 2014)(clarifying the content and context of his January 2012 remarks).

In 26 U.S.C. § 36B(b)(2)(A), as enacted by Section 1401 of ACA, Congress defined the term "premium assistance amount" and required enrollment "through an Exchange established by the State under 1311 of [ACA]."

However, the IRS has disregarded the Constitution and, in effect, has deleted the four words "established by the State" from Subsection 36B(b)(2)(A) to reach non-State exchanges. Permitting an agency or Executive Department to redefine a congressionally-defined word threatens the Constitution's diffusion of powers. First, the IRS exercised legislative power by altering the meaning of a congressionally defined term. Here, the term "Exchange" was capitalized and used almost 300 times in Title I. Second, the IRS has ignored the continued existence of dual federal-state sovereigns required by the Constitution.

By implementing the Regulations on federally-created exchanges ("*FCXs*"), the IRS went well outside of the Bicameral-Presentment process. Indeed, the magnitude of this extra-congressional legislative action is truly staggering. According to the non-partisan Congressional Budget Office, the Premium Tax Credit subsidies are projected to add $800 billion dollars in additional federal expenditures over the next decade. *Cannon*, 14 Harvard Health Policy Review at 36.

SUMMARY OF ARGUMENT

Delegation to an agency does not and indeed cannot exist *in vacuo*. It is derivative of a statutory grant of regulatory authority which itself must be constitutionally valid. Both the Regulations and

underlying Statutory Grants fall woefully short of complying with the Constitution.

According to the Congressional Research Service ("*CRS*"):

> the question of whether a reviewing court will defer to the Treasury Department's interpretation of the scope of §36B will depend principally on [1] whether that interpretation was made with the force of law pursuant to an exercise of delegated authority; [2] whether the extent of that delegation was ambiguous; and [3] whether the implemented interpretation was reasonable.

Jennifer Staman and Todd Garvey, Congressional Research Service, *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* 7 (July 23, 2012)("*Staman-Garvey*").

The second and third prongs of *CRS's* formulation comprise the *Chevron* test.[3] *See e.g.*, PetApp at 14a-34a and 60a-71a. The Petition and Brief in Opposition both stressed these points. In contrast, *Amici* suggest deference hinges on the first prong of *CRS's* formulation whether or not the delegation is constitutional. If not constitutional, then any decision relating to the Regulations would be advisory.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). This axiom applies to the IRS.

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[3] Referencing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

Although *Chevron* has been cited thousands of times,[4] the *Chevron* test is incomplete and should be replaced. Because *Chevron* assumes, rather than questions, the validity of Statutory Grants, it is inconsistent with our Constitution of enumerated powers.

Amici respectfully request that the Court fill this gaping hole in the Court's delegation jurisprudence: the failure of courts to examine whether the underlying statutory grant of regulatory authority to an executive or administrative agency complies with the Constitution.[5] By adding a step, denominated either as "Step-Zero" or as "Step-Three", to *Chevron's* "two-step" approach, a much more robust judicial approach to delegation of regulatory authority is possible. *See generally,* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006)(Recommending an initial inquiry into whether the *Chevron* framework applies at all).

The Regulations and Statutory Grants are fatally flawed. Because the Statutory Grants do not comply with the Constitution's strict lawmaking requirements, those Statutory Grants and any

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[4] Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. Cal. L. Rev. 1327, 1328 n.8 (2005)(Noting that *Chevron* was cited about as many times as the combination of *Marbury v. Madison*, 5 U.S. 137 (1803), *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973)).

[5] *See*, Hamilton, *Representation and Nondelegation*, 20 Cardozo L. Rev. at 821 ("The Court has addressed delegation to administrative agencies with little rigor, leaving a gaping hole in the Constitution's balanced structure of checks and balances.")(footnote omitted).

ensuing regulation based on those statutory grants are void *ab initio*.

ARGUMENT

I. *CHEVRON* DOES NOT APPLY TO INVALID GRANTS OF REGULATORY AUTHORITY.

The question of judicial deference to an agency's construction of a statute came before this Court thirty years ago in *Chevron*. 467 U.S. 837. *Chevron* has been summarized as follows:

> *Chevron* famously creates a two-step inquiry for courts to follow in reviewing agency interpretations of law. The first step asks whether Congress has "directly spoken to the precise question at issue," an inquiry that requires an assessment of whether Congress's intent is "clear" and "unambiguously expressed." The second step asks whether the agency's interpretation is "permissible," which is to say reasonable in light of the underlying law.

Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. at 190-91 (footnotes omitted). In writing about the emerging law of *Chevron* Step Zero, Professor Sunstein noted that "the most important and confusing questions have involved neither step. Instead they involve *Chevron* Step Zero – the initial inquiry into whether the *Chevron* framework applies at all." *Id.* at 191. Because *Amici* believe the Statutory Grants are fatally flawed, this case presents a perfect opportunity to transform the *Chevron* test from a two-step to a three-step analysis by adding a Step Zero.

A. Considering *Whitman*, Congress Should Determine The Scope Of IRS Authority

The Fourth Circuit addressed the scope of certain regulatory authority granted to the IRS by Congress. The Court did not address which branch is empowered to determine the scope of that delegated regulatory authority: Congress, the IRS, or the courts. Under the Separation of Powers Doctrine, this Court should find that only Congress is empowered to determine the scope of an agency's regulatory authority. "The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001). The Fourth Circuit incorrectly allowed the IRS to define the scope of its own authority by allowing the IRS to expand the definition of Exchange to include *FCXs* in addition to the State Exchanges. PetApp at 33a ("[T]he IRS Rule is a permissible construction of the statutory language.").

B. The Court Would Become Embroiled In The Legislative Process If It Accepts An IRS Construction Of A Statute Which Contradicts The Plain Words Of That Statute.

The Separation of Powers Doctrine and the Execution Clause prevent the IRS from arguing a construction of Section 36B that contradicts the clear meaning of its words. The principle that neither the Judiciary nor the President may unilaterally exercise legislative power applies equally to independent agencies and executive departments, including the

IRS. For a court to approve such a construction would embroil the judiciary in the legislative process.

To extend the Regulations to States with *FCXs*, the IRS ignored the constraint that the Exchange is to be "established by the State." Instead the IRS explained:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange ....

PetApp at 9a.

The IRS, like the courts, must defer to the law enacted jointly by the Congress and the President. Except for the President's ability to veto and to recommend legislation, the Executive Branch has no role in the legislative process. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

The IRS may not rewrite, through interpretation and advocacy, words agreed to by the House, Senate, and President. Allowing the IRS to promulgate regulations or to present an argument that ignores the statute's clear meaning[6] undermines the deference due to a coordinate branch of government and gives the Executive Branch power to make law.[7]

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[6] *See, NFIB, Joint Opinion* 132 S.Ct. at 2653 ("[S]elf-serving litigating positions are entitled to no weight. What counts is what the statute says, and that is entirely clear.").

[7] When the Secretary performed her duty, her actions could not have reached beyond the statute that created that authority. *INS v. Chadha*, 462 U.S. 919, 953-54 n.16 (1983).

To have enabled the IRS to extend the Regulations to states with *FCXs*, Congress had two options. It could have enacted a statute containing the Regulations' language or it could have passed a statute ratifying the Regulations. Congress did neither. Furthermore, ratification by Congress must be explicit, not implicit.

C. Implied Ratification Of The Regulations Would Create A Dispensing Power In The IRS And Would Allow The IRS To Pick And Choose Which Statutes To Faithfully Execute.

Implied ratification of agency or executive action creates a dispensing power that would allow an agency or department to pick and choose which statutes to faithfully execute. It turns rulemaking power on its head – having agency or executive actions control legislation instead of being controlled by legislation. Such a doctrine has no support in the Constitution. It asserts a principle that clothes the President, executive departments and independent agencies with "a power entirely to control the legislation of [C]ongress, and paralyze the administration of justice." *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838)(The Court firmly rejected the contention that the President's duty "to see the laws faithfully executed, implies a power to forbid their execution"). Allowing the IRS to ignore the "established by the State" constraint is the equivalent of empowering the IRS to forbid the execution of a statute.

Even if issuing the Regulations is viewed as "interstitial lawmaking," it is impermissible. While the Supreme Court has long allowed the practice of

interstitial lawmaking, *Wayman v. Southard*, 10 Wheat. (23 U.S.) 1, 43 (1825), it has not allowed interstitial regulations to conflict with the authority provided by statute. More than a century ago, the Court struck down an order of the Secretary of the Navy that directed that a particular training vessel was not to be considered "at sea" in connection with an officer's compensation for sea service. According to the Court, the Secretary did not have authority to declare something as "shore duty" that the statute requires the Navy to treat as "sea duty". The Court declared that the Secretary only had authority to "establish regulations in execution of, or supplementary to, ***but not in conflict with***, the statutes defining his powers, or conferring rights upon others." *United States v. Symonds*, 120 U.S. 46, 48-49 (1887)(emphasis added). The issuance of any regulation which redefines an Exchange "established by the State" to include an *FCX* directly conflicts with the Statutory Grants. This is not allowed.

To the extent that *Chevron* and its progeny suggest that a congressionally imposed constraint upon the scope of an agency's authority is flexible or may be set by the agency itself, those cases ignore *Symonds* and *Kendall* and should be distinguished or overruled.

D. Regulatory Authority Is Void If The Underlying Statutory Grant To The IRS Is Unconstitutional.

Examining the validity of ACA's Statutory Grants to the IRS is consistent with the long-standing principal of statutory construction that when a court is asked to construe a law, it has authority to determine if that law exists. *United States National*

Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 446-447 (1993)("*USNB*"). "There can be no estoppel in the way of ascertaining the existence of a law." *South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877). Furthermore, "a court may consider an issue 'antecedent to ... and ultimately dispositive of the dispute before it, ***even an issue the parties fail to identify and brief.***" *USNB*, 508 U.S. at 447 (emphasis added, internal citations omitted).

> "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," ... even where the proper construction is that a law does not govern because it is not in force.

USNB, 508 U.S. at 446 (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). The failure of litigants to argue the legal issues correctly does not render an appellate court powerless to address those issues properly:

> Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.

Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.) (en banc), *cert. denied*, 537 U.S. 823 (2002)(internal citation omitted). Indeed, appellate review of the proper law prevents misapplication of

the law, injustice, and construction of hypothetical laws.

Because courts have independent authority to determine if a law exists, this Court may and should examine, *sua sponte*, the constitutionality of the Statutory Grants.

II. CONGRESSIONALLY DEFINED WORDS, SUCH AS "EXCHANGE", MAY NOT BE ALTERED BY THE IRS.

After Congress defined the word "Exchange" as State-created, it used the word almost 300 times in Title I of ACA. Therefore, the IRS may not redefine the word "Exchange" to encompass an *FCX* because such redefinition by the IRS supplants legislation in violation of the Bicameral and Presentment Clauses. *See Chadha*, 462 U.S. at 952.

Although not every administrative action is subject to the bicameralism and presentment requirements, those requirements must be met whenever legislative power is exercised.[8]

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[8] *See* U.S. CONST. art. I, §1 and §7, cl. 2. It is apparent from reading the Constitution's other provisions and *The Federalist* No. 51 that our Founders were concerned about the natural tendency of people to develop into factions that would promote their own self-interests. Therefore, the Founders designed a legislative process that, in theory and practice, would be modeled today as a series of non-cooperative games whereby a bill becomes a law if and only if the President, Senate and House reach the same equilibrium point by agreeing to identical statutory language. *Cf.* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944)(generally regarded as the formal beginning of game theory) and John Forbes Nash, *Non-Cooperative Games* (1950)(Princeton University Ph.D. Dissertation).

Whether particular actions are an "exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Chadha*, 462 U.S. at 952 (internal citation omitted).

Indisputably, the power to tax belongs to Congress. U.S. CONST. art. I, §8, cl. 1 ("The Congress shall have Power ... To lay and collect Taxes, Duties, Imposts and Excises ...."). Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L. J. 239, 241 (2005) ("Taxation is a legislative function, and Congress, which is the sole organ for levying taxes ...."). In addition, the taxing power was considered so important by the Founders that taxation is the first of the eighteen enumerated powers of Congress.

The legislative character of an action may be established by an examination of the Congressional action it supplants. This "Supplantation Principle" was used to analyze the legislative veto in *Chadha*, 462 U.S. at 952 ("The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants"). The Court should extend this principle to all "legislative actions," whether undertaken by an Executive Department, the Judiciary, or an independent agency.

"In short, when Congress '[takes] action that ha[s] the purpose and effect of ***altering the legal rights, duties, and relations of persons*** ... outside the Legislative Branch,' it must take that action by the procedures authorized in the Constitution." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501

U.S. 252, 276 (1991)(brackets and ellipsis in original, emphasis added). *See also id.* at 258 n.4; and *Chadha*, 462 U.S. at 952.

The Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const. Art. I, § 1, and may not be conveyed to another branch or entity." *See e.g. Loving v. United States*, 517 U.S. 748, 758 (1996) (internal citation omitted). Accordingly, "Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is ... vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President ...." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

The Constitution spells out in detail the processes by which the two branches of Congress bring their diffused power to bear on federal lawmaking. The IRS has, in effect, amended the definition of an Exchange for purposes of Sections 1311 and 1401 to reach *FCXs* as well as State-created Exchanges. This redefinition is legislative in both character and effect. The extension of the Regulations to the *FCXs* is the functional equivalent of legislation because it affects the legal rights, duties and relations of many persons including "applicable taxpayers," employers, insurance companies and the state and federal governments. The Constitution simply does not permit this.

III. THE IRS MAY NOT IGNORE THE CONSTITUTION'S TEXT, STRUCTURE AND HISTORY TO REDEFINE AN "EXCHANGE" TO ENCOMPASS A FEDERALLY-CREATED EXCHANGE.

Amici believe that the continued vitality of States as States is a fundamental component of the language and structure of the Constitution. Consequently, the extension of the Regulations to the States where *FCXs* have been established amounts to a gargantuan transformation of our system of concurrent sovereignties.

That extension alters the Federal-State balance reached in the Constitution without an Article V Amendment being ratified. Under the Constitution, the continued independence of State sovereigns is not only crucial, but is literally guaranteed. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican form of Government"). It is important to recognize:

> "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." See *United States v. Lopez*, ante, p. 549.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring). Furthermore,

> [t]he Constitution uses state boundaries to fix the size of congressional delegations, ... ensures that each State shall have at least one representative, ... grants States certain powers over the times, places, and manner of federal elections ...,

> requires that when the President is elected by the House of Representatives, the delegations from each State have one vote, ... and allows States to appoint electors for the President ....

Id. at 841-842. It should be observed that these are not the only provisions in the Constitution that demand the continued existence of the States. Each and every article of the Constitution contains at least one such provision which considers the States as separate political sovereigns. U.S. CONST. at art. I-VII.

The importance of the distinction between the federal sovereign and the fifty independent State sovereigns cannot be overstated.

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. ***The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.*** It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

U.S. Term Limits, 514 U.S. at 838-39 (emphasis added); *The Federalist*, No. 51, at 323 (C. Rossiter, ed. 1961); and *New York v. United States*, 505 U.S. 144,

181 (1992). There is no doubt that our Framers diffused power to prevent tyranny.

Shortly after the Civil War, the Supreme Court analyzed the relationship between the States and the union of the States and concluded that the continued existence and independence of the States was required by the Constitution. The Supreme Court said:

> But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States ... And we have already had occasion to remark at this term, that the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that ***the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.*** The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States.

Texas v. White, 74 U.S. 700, 725 (1869)(emphasis added).

Until ACA was enacted and the Regulations were promulgated, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." *McCulloch*, 17 U.S. at 403. Through the Regulations, the IRS has obliterated the distinction between the States and the national government and fused them into a single "common mass." *Id.* Corrective action is needed immediately.

IV. Section 36B Violates Multiple Provisions In The Constitution.

Amici believe that Section 36B is unconstitutional for at least two reasons. First, Congress has evaded the Constitution's proscription against permanent appropriations. Second, because the Senate gutted the House-passed bill HR 3590 it is the originator of ACA. Consequently, the Senate violated the Origination Clause because ACA contains taxes which are "Bills for raising Revenue."

A. Permanent Appropriations, Like The §36B Subsidy, (1) Violate The Presentment, Bicameral And Appropriations Clauses; And (2) Defy The Temporal Limits On Each Term Of The President, Each Senator, And Each Member Of The House Because No Congress May Withhold Legislative Power From Future Congresses And Veto Power From Future Presidents.

Section 36B provides certain taxpayers with premium assistance in the form of a Premium Tax Credit ("PTC") for the taxpayer, with a subsidy

flowing from the United States Treasury directly to the taxpayer's insurance carrier to be applied toward the cost of the health insurance premium. *Staman-Garvey*. *See also*, Bernadette Fernandez, Congressional Research Service, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA)* (March 12, 2014)("*Fernandez*").

According to the *CRS*, "[f]or tax years beginning after December 31, 2013, 31 U.S.C. 1324 appropriates necessary amounts to the Treasury Secretary for disbursements due under §36B of the IRC. This permanent appropriation means that the premium credits do not require annual appropriations." *Fernandez*, at 1-2 n7.

The problem, under the Constitution, with any permanent appropriation is that it changes the Constitution's default setting: from a default of "no appropriation" without Congressional approval, to a default of making an "appropriation" unless Congress disapproves. In other words, the legislative triumvirate consisting of the House, Senate, and President must all agree to "not appropriate" rather than to comply with the Appropriations Clause, U.S. CONST. Art. I, § 9, cl. 7, requirement that all three must agree in order "to appropriate." This fundamentally transforms the political calculus and is not authorized by the Constitution without an Article V Amendment. Furthermore, the Appropriations Clause insures Congressional involvement whenever money is to be withdrawn from the Treasury. *OPM v. Richmond*, 496 U.S. 414, 424-26 (1990). Permitting a permanent appropriation blatantly defies the requirement of Congressional involvement.

The *PTC* subsidy is a federal appropriation on "auto-pilot" for many years to come. It violates the Separation of Powers Doctrine because certain appropriations decisions have been taken from each future Congress and each future President, those decisions having been made by the 111th Congress and 44th President. Consequently, each future Congress will exercise less than its full complement of legislative powers and each future President will exercise less than his or her full veto power. To the extent that the quanta and subject matter of future appropriations decisions already will have been made for later Congresses and Presidents by the 111th Congress and President, it is wrong.

This Court has repeatedly prevented Congress from ceding its own power. Congress cannot abdicate its responsibilities by voluntarily ceding its powers.

> That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. *See Freytag v. Commissioner*, 501 U.S. 868, 880 (1991); cf. *Chadha, supra*, at 942, n. 13...

Clinton, 524 U.S. at 452 (Kennedy, J., concurring).

The financial risk associated with running federal appropriations on auto-pilot is analogous to the danger associated with flying a commercial jet aircraft on auto-pilot after it has lost both its engines.[9] For example, on January 15, 2009, U.S.

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[9] Utilizing a football analogy, mid-course corrections are common where a quarterback, such as Peyton Manning, Tom Brady, or Aaron Rogers, is faced with a novel defense. In that situation, each quarterback usually calls an "audible" at the line

Airways Flight 1549 lost both of its engines after being hit by a huge flock of birds. Unable to return the aircraft to LaGuardia Airport or to emergency land at either Teterboro or Newark Airport, Captain Chesley Sullenberger made mid-course corrections to enable the aircraft to "glide" onto the Hudson River. His split-second decision saved the lives of the 150-plus passengers and crew. Wendy K. Mariner, George J. Annas, and Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 Drexel L. Rev. 341, 341 (2009). Similarly, the Constitution is designed to allow for "mid-course" corrections. By holding biennial House elections, the House's membership may be completely overhauled every two years. U.S. CONST. Art I, § 2, cl. 1. Permanent appropriations prevent those corrections.

This Court has recognized: "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York*, 505 U.S. at 182. In other words, the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.* Here, however, the encroachment is more subtle and perhaps even more dangerous. The 111th Congress and the 44th President consented to appropriations on behalf of their successors. That is to say, in connection with the *PTC*s, the 111th

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of scrimmage. Alen Dumonjic, *Highlighting Audible Usage by the NFL's Best QBs*, Bleacher Report (Aug. 5, 2012) available at http://bleacherreport.com/articles/1285529-highlighting-audible-usage-by-the-nfls-best-qbs.

Congress and the President enlarged their own appropriations power at the expense of future Congresses and Presidents by encroaching upon the legislative and veto powers of future Congresses and Presidents, respectively.[10] *See Clinton*, 524 U.S. at 451-452.

The Constitution's temporal (*i.e.*, time) constraint is self-evident. Power is diffused by requiring periodic elections for President, Senators and members of the House, with each type of office having its own duration. Senators are elected for six years. U.S. CONST. art. I, §3, cls. 1&2; U.S. CONST. amend. XVII. The President is elected for four years. U.S. CONST. art. II, §1, cl. 1. Members of the House of Representatives are elected for two years. U.S. CONST. art. I, §2, cl. 1. The authority of each Representative, Senator, and President expires at the end of his or her term in office, respectively. Exercising any legislative (or veto) authority beyond the "expiration date" transfers power away from the People to choose their own representative(s).

The temporal constraint has been expressed in real estate terms. The holding of an elective office has been analogized to a "temporary lease" from the nation's citizens. Alan B. Morrison, *A Non-Power Looks at the Separation of Powers*, 79 Geo. L. J. 281, 282 (1990). Utilizing this real estate analogy, the Constitution does not permit holdover tenancies by members of Congress or the President. By

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[10] *See Clinton*, 524 U.S. at 452 (Kennedy, J., concurring)("By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.").

appropriating beyond the expiration of its term, the 111th Congress became a "holdover" Congress.

"'The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and ***for a certain limited period***, to representatives of their own chusing; and whenever it is executed contrary to their Interest, ... their Servants can, and undoubtedly will be, recalled.'" *U.S. Term Limits*, 514 U.S. at 814 n.26 (internal citation omitted, emphasis added)(quoting George Washington).

Just as the function of the Taxing and Borrowing Clauses[11] is to control the flow of money ***into*** the Treasury, the function of the Appropriations Clause is to control the flow of funds ***out*** of the Treasury. *See NFIB*, 132 S.Ct. at 2600 ("Congress's authority under the taxing power is limited to requiring an individual to pay money ***into the Treasury, no more***.")(emphasis added). The Appropriations Clause does not address projected or hypothetical funds. It is limited to funds that already exist and have arrived at the Treasury. After all, it is axiomatic that Congress may not appropriate what is not there. Considering the Founders placed the Appropriations Clause in Article I, not Article II, the appropriations power belongs to Congress, not the Executive Branch.

B. As A Senate-Originated Bill, ACA Cannot Contain Any Tax.

By latching onto the House-passed version of HR3590, striking the bill's contents, and replacing those contents with the Senate's own words, the Senate admitted that ACA is a "Bill for raising

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[11] CONST. art. I, §8, cls. 1&2, respectively.

Revenue." No other explanation is plausible or even possible. The Senate struck the entirety of the House-passed bill. Not a single word remained after the phase "be it enacted". Because the Senate passed a completely new bill it is the ***"originator"*** of ACA, not its amender.

"There are fundamental issues with Senate originated tax measures that strike at our Constitution's basic theory of representation and the taxing power." Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Brit. J. Am. Leg. Studies 71, 133 (2014)(*"Zotti-Schmitz"*). That theory is reflected in the Origination Clause which is the fulcrum of the Constitution and its ratification. The Origination Clause expresses the Founders' compromise solution regarding the linkage of taxation and representation. *Hearing on "The Original Meaning of the Origination Clause" before the U.S. House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice*, 113th Cong., 2d Sess. 15 (April 29, 2014)(Testimony of Nicholas M. Schmitz)("[T]he history of the Origination Clause reveals a deliberate constitutional "check and balance" under which nobody in the federal government except the direct representatives of the people in this House ... can constitutionally propose federal laws under the taxing power of Congress").

Simply stated, any Senate-originated tax measure is an affront to the Constitution. "[T]he Senate was never intended to write taxes and was explicitly forbidden from doing so in the Constitution." *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 134.

1. Because The Origination Clause And Power To Lay And Collect Sit In *Pari Materia*, All Taxes *Per Se* Are Bills For Raising Revenue

The Founders attached an enormous importance to funding the federal government. Consequently, a tax-related clause starts both sections 7 and 8 of article I. *Amici* observed the Origination Clause is followed by the Presentment Clause which prescribes the general procedure used to enact federal statutes. Similarly, *Amici* observed, the power "To lay and collect" is followed by the other Congressional powers specified in the remaining clauses of section 8. U.S. CONST. art. I, §8, cls. 2-18. Given this parallel structure, it follows that the phrase "Bills for raising Revenue" refers *per se* to any bill for a tax, duty, impost, or excise. Because ACA contains Section 36B, ACA must originate in the House.

According to the language and structure of article I, the words "originate" and "all" constrain Congress: only the House of Representatives may initiate the set of bills specified in article I, section 8. The Origination Clause and the power "To lay and collect", found in sections 7 and 8, respectively, sit in *pari materia*. Indeed, members of Congress have articulated this point as well. Brief of *Amici Curiae* U.S. Representatives Trent Franks *et al.* in Support of Appellant Seeking Reversal in *Sissel v. U.S. Dep't of Health & Human Servs.*, 17 (D.C. Cir., Docket No. 13-5202)("Moreover, *amici* submit that the Origination Clause should be read in *pari materia* with Article I, section 8, clause [1], the power "to lay and collect taxes, duties, imposts, and excises").

2. To Avoid "Junk Economics" In The Courtroom, All Tax Bills Must Originate In The House Because Any Tax Potentially Could Increase Or Decrease Total Federal Revenue.

The *a priori* analysis of the prospective impact upon federal revenue of any tax, for purposes of the Origination Clause, is, and always has been, a "red herring."

Because tax, duty, impost, and excise bills *per se* are "Bills for raising Revenue," it is not necessary to examine the purposes behind ACA and Section 36B nor to project whether federal revenue will be increased, decreased, or left unchanged thereby. Taxes could either raise or lower collections by the federal government.

Moreover, projecting changes in federal revenue is a notoriously difficult task which could involve the use of "junk economics" by the Court, Congress or the President. Junk economics, like junk science, does not belong in any branch. *See e.g.*, Peter W. Huber, *Junk Science in the Courtroom*, 26 Val. U. L. Rev. 723 (1992); and Paul A. Samuelson, *Economics* 263 (10th ed. 1976) ("Statisticians and economists cannot yet make accurate forecasts. Their guesses occasionally turn out to be quite wrong"). Even before he served as our nation's first Treasury Secretary, Alexander Hamilton understood the folly of anticipating increased revenues based on an extrapolation of an increased duty rate. He warned the People that revenues actually could be reduced by an increase in duty rate. "If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are

confined within proper and moderate bounds." *The Federalist* No. 21, at 142-43 (A. Hamilton).

In short, the requirements of the Origination Clause must be met regardless of the impact upon federal revenue. This more robust approach is necessary because any specific tax or any combination of taxes might increase or decrease federal revenues prospectively. *See id.* Furthermore, the Founders "decided to restrain the origination of all revenue raising bills (without the emphasis of "for the purpose of revenue") to the more popular and nationally representative chamber." *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 117. To preserve the principle that there shall be no taxation without representation, the Origination Clause must (1) apply to each and every tax bill; and (2) treat any Senate bill which completely guts a House-passed bill as a new Senate-originated bill.

3. The Senate Impermissibly Originated ACA Because It Gutted The House-Passed HR 3590.

On October 7, 2009, the bill entitled "Service Members Home Ownership Tax Act of 2009" ("SMHOTA") was introduced in the House of Representatives. It was assigned bill number HR 3590. HR 3590 was very short and consumed less than a single page of the Congressional Record. 155 Cong. Rec. H10550 (Oct. 7, 2009). SMHOTA unanimously passed the House the next day (416-0, Roll No. 768) 155 Cong. Rec. H11126-11127 (Oct. 8, 2009). SMHOTA included a tax credit for some members of the armed services who bought homes. Upon passage, the House sent the SMHOTA to the Senate.

On November 19, 2009, the Senate introduced the bill entitled "Patient Protection and Affordable Care Act" as an alleged amendment in the nature of a substitute for HR 3590 (Senate Amendment No. 2786). 155 Cong. Rec. S11607 *et seq.* (Nov. 19, 2009). After considerable debate, the alleged amendment was passed by the Senate (60-39, Rollcall Vote No. 396) on December 24, 2009. 155 Cong. Rec. S13981.

Amici refer to the Senate-passed bill as HR 3590* to distinguish it from the House-passed SMHOTA (*i.e.* HR 3590). *Amici* respectfully use an asterisk to distinguish the Senate's bill from the House's bill and to draw an analogy between an unprecedented increase in home run production during the period between 1998 and 2001 on the one hand,[12] and the Senate's transformation of the one-page House-passed bill, 155 Cong Rec. H10550, into the Senate's massive tome on the other hand, 155 Cong. Rec. S11607 *et seq.*

The Senate-passed HR 3590* differs markedly from the House-passed SMHOTA. First, the Senate completely obliterated the House's language. 155 Cong. Rec. S11607 ("***Strike all after the enacting clause*** and insert the following: ...").[13] Second, the Senate removed the short title of the SMHOTA and replaced it with its own short title: Patient Protection and Affordable Care Act. Third, the Senate-passed bill was approximately 532.21 times the length of the

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[12] *See e.g.* Tom Verducci, *Is Baseball in the Asterisk Era?* Sports Illustrated (March 15, 2004).

[13] The phrase "strike all" is not ambiguous in any way. It means that nothing was left in SMHOTA to amend. SMHOTA ceased to exist.

House-passed bill (an increase of 53,121 percent).[14] Fourth, originally the House voted unanimously to pass SMHOTA but later passed the Senate-passed HR 3590* by only seven votes (219-212, Roll No. 165), 156 Cong. Rec. H2153 (Mar. 21, 2010). Fifth, the Senate completely changed the subject matter of the bill, from one involving a tax credit for members of the armed services to one involving healthcare reform. Only the bill's number, HR 3590, was retained by the Senate.

Having passed both houses of Congress, HR 3590* became law on March 23, 2010 upon the President's signature. 124 Stat. at 1024.

4. Until An Article V Amendment Is Ratified, The Senate May Not Originate Section 36B

It is a fundamental principle of constitutional law that the chambers of Congress may not reallocate their own powers, *inter sese*. Only the People may reallocate the powers of the House and Senate through an amendment to the Constitution. *See generally U.S. Term Limits*, 514 U.S. at 837; and *Clinton*, 524 U.S. at 449. Thus, even an agreement among the House, Senate and President, such as was reached to enact ACA, is insufficient to permit Senate-originated tax bills.

In introducing and passing ACA, the Senate removed every vestige of the House-originated bill but for the bill's number. One cannot conclude ACA originated in the House without stretching the

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[14] *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 106-07 (2014)(Authors observed 380,000 words in HR 3590* versus 714 words in SMHOTA).

meanings of "originate" and "amend" well-beyond recognition.

There is no question that the Constitution's balance of power between the Senate and the House was ignored and that HR 3590 was converted from a House-originated bill into a Senate-originated bill the instant the Senate struck the entirety of the House's language.

V. The Court Cannot Salvage ACA And The Individual And Employer Mandates By Severing Section 36B From Them.

There is little dispute that Section 36B is inextricably intertwined with the Employer and Individual Mandates, and thus with ACA itself. *See generally* Brief for Petitioners at 8-9. As explained below, even Respondents and their *Amici* would not disagree.

According to many leading economic scholars, ACA cannot survive without the premium subsidies enacted by Section 36B. Brief *Amici Curiae* for Economic Scholars in Support of Appellees in *King v. Sebelius* 2 (4th Cir., Docket No. 14-1158) ("Congress ... structured the ACA as a series of interlocking reforms, of which premium subsidies are essential components. If those subsidies are unavailable ..., the other components of ACA will not work ....").

> [The basic economic] framework has been analogized to a stool with three legs. All three are necessary to fostering stable, functioning insurance markets consistent with Congress's goal of broad, affordable coverage. The first leg is a series of *non-discrimination rules* ... The second

> leg is the *individual mandate* ... *Premium subsidies* comprise the third leg. These ensure that all people subject to the mandate can afford insurance.

Id. at 3-4.

Others have recognized that the *PTC* subsidies are inseparable from the other components of ACA, *i.e.* the individual mandate and the non-discrimination rules:

> Elimination of the financial subsidies would have a domino effect on other components of the ACA as well:
>
> 1. The individual mandate... is predicated on the presence of financial support for the purchase of coverage for those who could not otherwise afford it...
> 2. In turn, the regulatory reforms prohibiting insurance companies from discriminating against those with past, current or anticipated health problems, along with other consumer protections, are predicated on the individual mandate.

Linda J. Blumberg, John Holahan, and Matthew Buettgens, *Halbig v Burwell: Potential Implications for ACA Coverage and Subsidies* 1 (July 2014)(Robert Wood Johnson Foundation & Urban Institute).

The Committee on Ways and Means and Committee on Oversight and Government Reform also recognized that "the employer mandate tax penalties are linked to the availability of [the Section 36B] subsidies." House Committee on Oversight and Government Reform and House Committee on Ways and Means, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's*

Taxes and Subsidies at 35, 113th Cong., 2d Sess. (Feb. 5, 2014).

The traditional test for severability is well-established:

> "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause,... Congress' silence is just that – silence – and does not raise a presumption against severability." *Id.* at 686....

New York, 505 U.S. at 186. As a matter of logic and judicial consistency, silence should not raise a presumption favoring severability.

According to one commentator, a conclusive presumption of inseverability applies in the absence of a severability clause:

> "From 1936 to 1968, the Supreme Court applied a presumption of inseverability to its interpretation of statutes. The Court should revert to that practice and make that presumption conclusive. Any other approach involves courts in doing what was explicitly forbidden in *INS v. Chadha* and *Clinton v. City of New York*: creating a statutory outcome not approved by both houses of Congress and signed by the President, or passed over his veto ... It will have the salutary effect not only of reserving to the legislative branch its proper function of balancing interests and passing a new

> law when its original attempt has to be redone, but also creating the impetus to craft laws more carefully and more narrowly from the start.

Tom Campbell, *Severability of Statutes*, 62 Hastings L. J. 1495, 1525 (2011).

It is evident that ACA would not and could not have been enacted without Section 36B. Therefore, regardless of whether the Court applies the *Alaska Airlines* standard or uses a conclusive presumption of inseverability, it should find that Section 36B is not severable from ACA.

CONCLUSION

For the foregoing reasons, the Regulations, Statutory Grants and ACA are void.

Respectfully submitted,

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